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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 41

THE CHOCTAW NATION AND THE CHICKASAW NATION, PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

No. 59

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (A. 131a–146a) is reported at 402 F. 2d 739.

JURISDICTION

The judgment of the court of appeals (A. 146a) was entered on October 31, 1968. The petition for a writ of

certiorari on behalf of the Choctaw Nation and the Chickasaw Nation was filed on January 25, 1969 (No. 976, O.T., 1968). By order entered on January 9, 1969, Mr. Justice White extended the time for the Cherokee Nation or Tribe of Indians of Oklahoma to file a petition for a writ of certiorari to and including March 5, 1969, and their petition was filed on March 3, 1969 (No. 1104, O.T., 1968). The petitions in both cases were granted on April 21, 1969, and the cases consolidated. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether by treaties and patents in the 1830's, granting outright to the petitioner-tribes tracts of lands described only by metes and bounds which included a segment of the Arkansas River, the United States conveyed ownership of the riverbed, so that it could not have passed to the State of Oklahoma under the "equal footing doctrine" when that State was created in 1907.

STATEMENT

1. The tribes before the Court as petitioners in the present cases inhabited lands in the southeastern United States that early felt the pressure of migrating white settlers involved in the westward expansion of the Nation. The government's response, in order to accommodate the divergent interests of settlers and Indians, took the form of offering the Indians parcels of land further west of the immediately threatened areas in return for their peaceful removal from the lands on

which they were then living. Under this program, by a series of treaties in the early 1800's the Cherokees and the Choctaws were resettled in various locations in a generally westward course, in territory acquired by the United States in 1803 as part of the Louisiana Purchase.[1]

Finally, by the Treaty of Dancing Rabbit Creek on September 27, 1830, with the Choctaws (7 Stat. 333), and by the Treaty of New Echota on December 29, 1835, with the Cherokees (7 Stat. 478), the government promised to convey to the tribes very large tracts of land in what is today the State of Oklahoma, and patents were subsequently issued conveying these lands to them "in fee simple".[2] In the treaties and patents the lands conveyed were described only by exterior metes and bounds (see, *e.g.*, A. 8a–12a), and in the aggregate these grants included all the lands through which the navigable portion of the Arkansas River in Oklahoma runs, a portion of the river being entirely within the grant to the Cherokees, and another segment of the river being the boundary line between the two grants. Both treaties solemnly assured the Indians that these new homelands would never be made part of a State or territory.[3] Approximately sixty years later, however,

[1] These developments are summarized in the opinion of the court of appeals (A. 134a–136a).

[2] The grant to the Cherokees covered more than 14 million acres. (See A. 11a).

[3] The Choctaws were promised that "no part of the land granted them shall ever be embraced in any Territory or State" (7 Stat. 333, 334), and the Cherokees were similarly told that their new lands

intent on creating a State that would include the lands that had been granted to the Indians, Congress in 1893 established a commission to negotiate an agreement with the tribes superseding the Treaties of Dancing Rabbit Creek and New Echota, and the tribes ultimately agreed to a disposition of their affairs whereby title to tribal lands passed to the United States as trustee for the individual members of the tribes. See Act of April 26, 1906, 34 Stat. 137; *Missouri, Kansas & Texas Ry.* v. *United States*, 235 U.S. 37.[4] The next year, 1907, Oklahoma was admitted to the Union "on an equal footing with the original States". See Act of June 16, 1906, 34 Stat. 267.

2. The issue in this case, an action for an accounting brought by the Indians against the State and various oil companies holding leases from the State, is the ownership of the riverbed of the portion of the Arkansas River, below the ordinary high water mark, bracketed by the grants. With ownership of the bed, of course, goes the right to exploit the subsurface resources, including oil. Oklahoma claims the entire riverbed, arguing that the United States had reserved ownership of the bed of the river and held it in trust for the future State, and that under the "equal footing doctrine" the title to the riverbed passed to the State automatically upon its entry into the Union. The

"shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory" (7 Stat. 478, 481).

[4] This Court's opinion in *Choate* v. *Trapp*, 224 U.S. 665, 667–670, details the factors leading up to these negotiations and the agreements reached. See also A. 136a–137a.

Cherokees claim the whole of the riverbed where it is surrounded by their lands, and half of the bed—to the "thread" of the river—where the river is the boundary between their lands and those of the Choctaws and Chickasaws.[5] These latter tribes—whose grant is earlier in time—claim the entire bed of the boundary river.[6]

The court of appeals, affirming the rulings of the district court (A. 113a, 114a, 117a–120a), recognized that "patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries" (A. 136a). Nevertheless, notwithstanding the unqualified language of the grants and the pledge that the lands would never be included in any State, the court below concluded that, under the "equal footing doctrine" of *Pollard* v. *Hagan*, 3 How. 212, as construed in *United States* v. *Holt State Bank*, 270 U.S. 49, the lands under the Arkansas River must be deemed to have been reserved for the future State because no explicit statements were made to the contrary. The court held that the State of Oklahoma, therefore, received title to the

[5] Although the grants involved in this case were made directly to the Choctaw Nation, the Chickasaw Nation owns an undivided interest in the Choctaw lands by virtue of the Treaty of January 17, 1837, 11 Stat. 573, and the Treaty of June 22, 1855, 11 Stat. 611.

[6] We express no view on the conflicting claims of the tribes where the Arkansas River is the boundary between the grants. Because of their ruling in favor of the State, the courts below had no occasion to decide this dispute and this Court will presumably not reach the question on the present review.

bed of the Arkansas River when it entered the Union and could thus control the exploitation of subsurface mineral rights.

SUMMARY OF ARGUMENT

The plain terms of the treaties and patents involved in this case reveal an unqualified grant in fee simple of *all* land encompassed within the perimeters specified, and these conveyances naturally carried with them the ownership of the beds of navigable rivers flowing through the region. They contain no suggestion that the United States sought to reserve ownership of the riverbeds; on the contrary, where the United States wished to preserve some interests or privileges, the treaties expressly defined them. Since the treaties expressed a clear intention to convey a peaceful, secure, and permanent homeland for the Indians, there is no basis for inferring any unarticulated intention to reserve ownership of narrow strips of land in the midst of these remote tracts.

Giving these treaties and patents their natural meaning is fully consistent with the principles that new States are deemed to enter the Union on an "equal footing" with their sister-States, and that the United States normally holds navigable waterways in territories in an "implied trust" for a prospective State. The "equal footing"-"implied trust" doctrine recognizes that the national government, in the pre-statehood period, has complete authority to dispose of lands that would otherwise pass automatically to a new State, if the government considers such a course

appropriate. The grants in this case amply manifested such a decision, for they created an autonomous Indian region that was pledged never to be included within the jurisdiction of any State. At the time of the conveyances these Indians were entrusted with a measure of sovereignty analogous to what a State would have received; contemporaneous pledges that no State would ever be erected must be taken to negate any general presumption that the United States, as a matter of policy, ordinarily holds lands under navigable rivers in trust for future States.

No support for a contrary conclusion is furnished by a letter from the Interior Department written in 1908, asserting that ownership of the bed of the Arkansas River had been reserved and had passed to Oklahoma upon statehood. The letter simply quotes generalized discussions in this Court's cases but makes no effort to analyze the grants involved here to determine the effect of those principles upon the interpretation of these grants. The letter also contains several factual inaccuracies on material issues. Since it was drafted more than seventy years after these treaties and patents, the letter cannot be said to represent a "contemporaneous" executive construction. That letter, therefore, does not deserve any weight in this Court's appraisal of pertinent factors underlying a proper interpretation of the grants. On a fresh and objective analysis, the treaties and patents will be found to have conveyed ownership of the riverbeds claimed by petitioners; the contrary holding of the court of appeals was error.

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ARGUMENT

THE LAND GRANTS TO PETITIONERS INCLUDED OWNERSHIP OF THE BED OF THE SEGMENT OF THE ARKANSAS RIVER ENCLOSED BY THE GRANTS, AND THE RIVERBED NEVER PASSED TO THE STATE OF OKLAHOMA

The United States government supports the position taken by the Indians in this litigation that the treaties entered into between the government and the tribes nearly a century and a half ago, as implemented by the land patents, effectively conveyed to the Indians the full and complete ownership of that portion of the bed of the Arkansas River that lies within the area encompassed by the grants. In our view the narrow construction placed upon these grants by the court below ~~deserves~~ disserves the clear intendment of what this Court has called the "solemn treaties" between the United States and these tribes. *Atlantic & Pacific R.R. Co.* v. *Mingus,* 165 U.S. 413, 437.

A. THE GRANTS ON THEIR FACE UNRESERVEDLY CONVEYED OWNERSHIP OF ALL LAND WITHIN THE SPECIFIED PERIMETERS, INCLUDING THE LAND BENEATH NAVIGABLE WATERS

The treaties and patents involved in this case conveyed huge tracts of land to the Cherokee and the Choctaw Indians, in fee simple, as their permanent homelands. The lands granted were defined simply by reference to lines marking the perimeters of the tracts conveyed; circumscribed by these boundaries was the portion of the Arkansas River flowing through the area. By ordinary rules of conveyancing, as well as the natural meaning of the language used, these grants carried with them the ownership of everything in-

cluded within their perimeters, since there was no expression of any intent to qualify or limit what on their face are outright grants of all the territory defined by the exterior metes and bounds specified.

Underscoring the breadth of the cession to the Choctaws, for example, are the provisions for complete self-government of their "country" (Arts. II, IV, 7 Stat. 333–334), and for the Choctaws to require written permits of anyone who desired to trade with members of the Nation (Art. X, 7 Stat. 335). Furthermore, the only reference in the Treaty of Dancing Rabbit Creek to "navigable streams"—apart from mention of the Arkansas River and the Red River as constituting or as intersecting the boundaries of the grant—was the assurance *to the Choctaws* that they would have free use of all such streams and be subject to no higher toll or duty than citizens of the United States (Art. XI, 7 Stat. 335). In that same article, reflecting the only express reservation of rights in the treaty, it was provided that the United States might establish any necessary post offices and military post roads and posts. There was not even a mention of the right of white men to travel along the navigable waterways within the territory ceded, much less an indication of an intention to reserve ownership of the beds of such rivers.

The structure of the Treaty of New Echota with the Cherokees was much the same. Explicitly reserved were the right to establish and maintain military posts and roads as might be necessary for the "interest and protection" of the Cherokees, along with

the right to the free use of "land, timber, fuel and materials" for the construction and support of such facilities, "provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made" (Art. 3, 7 Stat. 480–481). The Cherokees, too, were accorded rights of self-government, see *Atlantic & Pacific R.R. Co.* v. *Mingus, supra,* provided only that their laws not be inconsistent with the Constitution of the United States or with the acts of Congress "regulating trade and intercourse with the Indians", and that the Indian laws would not apply to soldiers and citizens traveling or residing, with permission, in the Indian country (Art. 5, 7 Stat. 481). Further highlighting the scope of the grant to the Cherokees is the provision that, in addition to the millions of acres conveyed to them in fee simple, the Indians were guaranteed "a perpetual outlet west, and a free and unmolested use of all of the country west of the western boundary" of the tract, "as far west as the sovereignty of the United States and their right of soil extend". But appended to this assurance, amply testifying to the ability of the draftsmen to define conditions and reservations when any were intended, was the proviso that if the "salt plain on the western prairie" fell within the limits of that outlet, "the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees" (Art. 2, 7 Stat. 480).

No article in the Cherokee treaty, as none had in the treaty with the Choctaws, hinted at a reservation of ownership of the beds of the rivers flowing through

the lands ceded. Indeed, it would have been pointless for the United States to have reserved ownership of submerged land of no apparent value in the midst of a remote tract that was conveyed to the Indians precisely because it was far removed from the regions where the United States government and white settlers had substantial interests. The absence of any express clause dealing with title to the riverbed, therefore, must fairly be attributed to a desire to avoid the superfluous.

B. NOTHING IN THE "EQUAL FOOTING"-"IMPLIED TRUST" DOCTRINE UNDERMINES THE INTENT AND EFFECT OF THE GRANTS TO PETITIONERS

The only speculation thus far advanced for imputing to the treaty-makers some intention to reserve ownership of the riverbeds rests on a legal principle—the "equal footing doctrine"—that *may* inform the search for intent, but is no substitute for a factual inquiry into actual intent. The premise of the "equal footing doctrine" is that the original thirteen States assumed full ownership of the lands below navigable waterways, with the national government entrusted by the Constitution only with authority to regulate the use of navigable waters for the protection and promotion of commerce and the maintenance of national defense. When new States are admitted to the Union, according to this principle, they should be assumed (as is customarily provided in the Congressional act or resolution) to be admitted on "equal footing" with their original sister-States. A corollary of this as-

sumption is the "implied trust" concept: that land below navigable waters is held by the United States before statehood "in trust" for future States, and passes automatically to the State upon its entry into the Union. See, *e.g.*, *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57, 65–66. These principles, however, do not properly justify the construction reached by the court below.

The "equal footing doctrine" is generally traced to the decision in *Pollard* v. *Hagan*, 3 How. 212, a decision rendered in 1845—ten years after the treaty with the Cherokees was concluded and fifteen years after the treaty with the Choctaws. Thus it is immediately doubtful that the silence of the treaty-makers on the precise question of ownership of the riverbed can fairly be interpreted as a conscious decision to reserve these lands to assure the "equal footing" of a future State. But in any event, the development of this doctrine, even after it was articulated by this Court, is completely consistent with effectuating what we believe was the clear intent to convey title of the riverbed to the Indian grantees.

The situation in *Pollard* involved a congressional attempt, *after* Alabama had entered the Union, to grant land below the high water mark of the Mobile River. In explaining why this attempt was ineffectual, some of the Court's language implied a lack of power in the federal government *ever* to convey land under a navigable river, even before statehood, on the theory that in such a circumstance the new State would not stand on an equal footing with the original States.

Those suggestions were quickly repudiated five years later in *Goodtitle* v. *Kibbe,* 9 How. 470, 478, where the Court followed the narrow holding of *Pollard* but explained: "Undoubtedly, Congress might have granted this land to the patentee * * * before Alabama became a State. But this was not done." Accord, *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 83. This "whole subject has been clarified" (*id.* at 84) in *Shively* v. *Bowlby,* 152 U.S. 1, which contains an exhaustive history of the "equal footing"-"implied trust" doctrine, stating the course that has generally been followed by the United States as a matter of policy, while affirming its power to depart from this policy by making pre-statehood grants (152 U.S. at 48, 49–50, 58):

> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. * * *
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> * * * * *
>
> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out

other public purposes appropriate to the objects for which the United States hold the Territory.

* * * * *

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory * * * that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

* * * * *

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international

> duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

As the Court there made clear, reservation of the ownership of the beds of navigable rivers is a matter of policy judgment, subject to exception when deemed appropriate by the proper organs of the national government. The analogy of the United States as "trustee" for prospective States, therefore, is imprecise, for prior to statehood the national government remains free to dispose of such lands as it sees fit, even if the future State will thus lack complete equality with its sisters because of the conveyance. See United States Constitution, Art. IV, § 3; *Alabama* v. *Texas,* 347 U.S. 272, 273–274, and 275, 277 (Reed, J., concurring). Short of an outright grant in fee simple, the United States may also determine to hold such lands in trust for purposes other than automatic transfer to a later created State, and such a trust will effectively preclude automatic acquisition by the State under the "equal footing" doctrine. See *Knight* v. *United States Land Association,* 142 U.S. 161, 183; *Shively* v. *Bowlby, supra,* 152 U.S. at 30–31.[7]

[7] Thus, to the extent that in 1906 the tribes ceded their interest in the riverbed to the United States in trust for the members of the tribes (see p. 4, *supra*), ownership of the bed did not in any event pass to Oklahoma when it became a State in 1907.

The "equal footing"-"implied trust" doctrine, therefore, marks the beginning and not the end of the inquiry into what the national government intended to pass in a particular conveyance. But before those principles even become relevant in construing the scope of a grant, there must be some demonstrable expectation that the lands involved will ultimately form part of a State. The understanding at the time of the grant is what is pertinent for these purposes, and thus the general purpose at the time of the Louisiana Purchase to hold the territory for the creation of States is not controlling. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* 260 U.S. at 85.

That critical premise was explicitly negated in the treaties involved here. The Cherokees and the Choctaws do not assert ownership of the bed of the Arkansas River through "piecemeal" grants to individuals of "private property" carved from land held "for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community." *Shively* v. *Bowlby, supra.* Here, an entire region was conveyed to tribes of Indians as part of their resettlement, with assurances of self-government and with the pledges that their new homelands *never would be part of any State.* As the Supreme Court of Oklahoma has observed, these treaties "in a measure departed from" the original purpose of the Louisiana Purchase to create new States. *Vickery* v. *Yahola Land & Gravel Co.,* 158 Okla. 120, 123, 12 P. 2d 881, 885. Far from permitting any inference that the United States was

implicitly reserving from otherwise unqualified grants the ownership of riverbeds which would later be transferred automatically to a State, these treaties assured the Indians a sovereign autonomy that, by necessary parity of reasoning, must be taken as passing title to the riverbeds *to them* as the authority that was constituted *in lieu of* a prospective State.

This Court has already recognized the unique character of these treaties. In *Atlantic & Pacific R.R. Co.* v. *Mingus, supra,* the Court sustained a statutory forfeiture of land previously conveyed to a railroad company on the condition that it complete a lengthy railroad within a certain period. The company defended by pointing out that the proposed route lay through the Indian country ceded to the tribes presently before the Court; that the original statutory grant had promised that Congress would procure the necessary extinguishing of Indian ownership as soon as public policy and the Indians' welfare allowed; but that Congress had failed to take any steps along those lines. In explaining why the lands held by the Choctaws and Cherokees under the Treaties of Dancing Rabbit Creek and New Echota would not be construed as falling within the statutory term "Indian territory", the Court explained [165 U.S. at 435–436]:

> * * * [A] reference to some of the treaties, under which it [the land] is held by the Indians, indicates that it stands in an entirely different relation to the United States from other Territories, and that for most purposes it is to be considered as an independent country.

Under such treaties, the Indians had been enacting and executing their own laws, appointing their own

officers, raising and expending their own revenues (165 U.S. at 436). In this context, the Court found it impossible to believe that Congress could have intended to commit itself to extinguish "a title guaranteed to the Indians by solemn treaties and which had been possessed by them [by that time] for upwards of forty years with the powers of an almost independent government" (165 U.S. at 437).[8]

In this light, we submit, wooden—and essentially retroactive—application of the supposed strictures of the "equal footing"-"implied trust" doctrine is inappropriate. To ascribe to the United States government, whose agents drafted those treaties, an unexpressed intent to reserve ownership of the bed of a river traversing autonomous Indian lands, for the benefit of a hypothetical State that the government explicitly promised would never comprehend those lands, would be to indulge a cynical fiction without any basis in fact. Such a niggardly construction is utterly devoid of suport in the circumstances surrounding the conveyance, and is on the contrary manifestly inconsistent with the bilateral understanding of the rights being created.

In concluding that it could not accord these treaties their evident scope, the court below relied heavily on the decision in *United States* v. *Holt State Bank,* 270

[8] The Treaty of New Echota with the Cherokees had declared that, "to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States," Congress might provide for them to send a delegate to the House of Representatives (Art. 7, 7 Stat. 482).

U.S. 49. In *Holt Bank* this Court had summarized the "equal footing doctrine" and its effect in these words (270 U.S. at 54–55):

> It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such land by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the States and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly. * * * But, as was pointed out in *Shively* v. *Bowlby,* [152 U.S.] pp. 49, 57–58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty

> or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The references to commerce, navigation, international duty, etc. were of course not intended to be anything more than illustrations of the purposes for which the United States government might find it appropriate in the exercise of its sovereign capacity to transfer lands under navigable waterways instead of retaining them for a future State. The court below erred in erecting what this Court provided as a generally sound guide, which may prove helpful in discerning the actual intent of a grant, into a presumption of law of nearly irrebuttable proportions. In seizing upon the phrases "in exceptional circumstances" and "unless the intention was definitely declared or otherwise made very plain" (A. 138a), the court of appeals failed to take proper account of the circumstances in which that language was used. Analysis of the context in *Holt State Bank* will demonstrate, we believe, that the principles there expressed and applied support, if indeed they do not compel, the conclusion that the treaties and patents in the present case effectively passed title to the bed of the portion of the Arkansas River flowing through the Indians' lands.

At issue in *Holt Bank* was the ownership of the bed of a lake that had been drained after Minnesota was

admitted to the Union. The Court noted (270 U.S. at 57-58):

> An affirmative disposal is not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. * * *

The Court declined to accept the contention that merely assigning the lands to an Indian reservation prevented their passage to the State under the "equal footing doctrine," because that view would have extended to all navigable waters, including the 400-square mile Red Lake and the large international Lake of the Woods. Significantly, no grant of a fee was involved, with promises of perpetual autonomy; the government there had merely established a reservation for the Indians in return for their cession of their aboriginal right of occupancy of some surrounding lands. The Court emphasized this factor (270 U.S. at 58-59):

> There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U.S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from

the established policy, before stated, of treating such lands as held for the benefit of the future State.[9] * * *

In *Holt Bank*, moreover, the pertinent treaties with the Indians preceded by only three years the admission of Minnesota as a State. Similarly, the grants to

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[9] Compare *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, where an Act of Congress set apart "the body of lands known as Annette Islands" as an Indian reservation for the Metlakahtla Indians and the question was determining the perimeters of the grant. The Court began by examining the language of the statute and then stated (248 U.S. at 87):

"As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created * * *." After an examination of the circumstances surrounding the legislation, the Court held that it included the lands under the adjacent navigable waters. In the present case, the problem is a simpler one, since the lands in question are within the outside limits of great unconditional land grants.

In a post-*Holt* decision, the Ninth Circuit found no inconsistency in following the *Alaska Pacific Fisheries* approach of examining the surrounding circumstances to determine the scope of the land included within an Executive Order reserving for Indians tracts of land described by government survey lot and section descriptions. *Moore* v. *United States*, 157 F. 2d 760, certiorari denied, 330 U.S. 827. The court rejected an attempt to make the "equal footing" doctrine an automatic and inflexible rule, and held instead that the reservation included adjoining underwater lots. The court explained (157 F. 2d at 765):

"* * * There [in *Holt Bank*], as in the Annette Islands case and the instant appeal, the question was one of intent. *Alaska Pacific Fisheries* v. *United States*, *supra*, is not mentioned and we cannot regard it as overruled sub silentio. * * *"

individual settlors in *Shively* v. *Bowlby, supra,* 152 U.S. at 51, were made only nine years before Oregon entered the Union. In those cases, it was reasonable to determine that Congress *had not intended* to convey away the lands that would otherwise imminently pass to the States. Here, by contrast, at the time the treaties were drawn and signed, and at the time the patents were issued, the express determination was that there would never be any State with jurisdiction over the uplands, much less potential ownership of the bed of a river running through those lands. Indeed, it was not until more than seventy years later, after the Indians had been persuaded to renegotiate their interests, that it was even found possible to create the State of Oklahoma and include the Indian lands in it.[10]

In both of those cases, too, important national and international waterways were involved: in *Shively* it was the Columbia River, and in *Holt Bank* it was Mud Lake, which was found to have been a wide portion of a river long used by settlers and traders for travel and commerce (270 U.S. at 56–57). There is no indication that at the time the United States government granted to the Choctaws and Cherokees the tracts of land surrounding a major segment of the Arkansas River, the river was an important artery of commerce. In any event, one of the principal, express purposes of the

[10] See *Choate* v. *Trapp, supra,* 224 U.S. at 667–670.

treaties was to secure for the Indians a region where they would be free from the incursions of unwelcome white men (see pp. 2–3, *supra*). Even though the Indians may not have been given complete authority to control the use of the river for commerce, there is no reason to believe the United States retained anything more than a right to regulate navigation and commerce, a function that *Pollard* v. *Hagan, supra*, established did not carry with it a reservation of ownership of the riverbed.[11] And it cannot be denied, we believe, that inclusion of the riverbeds in the grants fulfilled an appropriate public purpose; conveyance of unreserved ownership of all land embraced within the tracts represented a fair and sensible cession of what was to be a permanent, quasi-independent homeland for the Indians, exchanged for their removal from lands the white settlers sought to claim.

We therefore submit that, construing the treaties and patents with the aid of all available indicia of their meaning, and not simply according to a single subsequently developed maxim of interpretation, the grants of land to the Cherokees and Choctaws sufficiently manifested the national government's intent to include in its cession the ownership of the bed of the river flowing through the Indians' new homelands.

[11] Although the treaties adverted to congressional regulation of commerce with the Indians and travel through their territory by white citizens, permission from the tribes was apparently contemplated as a pre-condition to such travel or residence in the area by non-Indians. See, *e.g.*, Arts. 5 and 6, Treaty of New Echota, 7 Stat. 481.

There is no warrant for imputing to the government an intention to retain the ownership of isolated strips of land beneath the Arkansas River to be held in trust for a hypothetical State that at the time the parties solemnly declared would never come into existence.

C. A CONTRARY CONCLUSION REACHED BY THE DEPARTMENT OF THE INTERIOR IN 1908 WOULD NOT JUSTIFY REJECTION OF PETITIONERS' CLAIMS

In the case of *State* v. *Nolegs*, 40 Okla. 479, 484–485, 139 Pac. 943, 945, where the issue was the navigability of a particular portion of the Arkansas River, the Supreme Court of Oklahoma cited, as one item of evidence establishing navigability, a letter from the Department of the Interior which embodied that conclusion.[12] That letter (which we have reproduced in

[12] *Nolegs* was an action by the State of Oklahoma against riparian owners who had purported to lease mineral rights in the bed of the Arkansas River. The court did not discuss the "equal footing"-"implied trust" doctrine, but concluded that, because it found the river to be navigable, ownership of the bed had passed to the State upon its entry into the Union. The only Indian property-owner in the case, an Osage, was dismissed as a party because of the absence of the United States, from whom he claimed. The court had no occasion to discuss the significance of the treaties and patents involved in the present case.

In *Vickery* v. *Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 P. 2d 881, the Oklahoma court held that a Cherokee allottee had no claim for minerals taken out of the bed of the Arkansas River. Because in its view the United States would have had no proper purpose in conveying ownership of the riverbed to the Cherokees, the court determined that these lands had been reserved in trust for the State of Oklahoma and had passed to it. We submit that the court's analysis pays insufficient attention to

full as an Appendix to this brief) was prepared by the Acting Commissioner of Indian Affairs and authorized by the Secretary of the Interior as a response to a request for instructions from the Commissioner to the Five Civilized Tribes (which included the Cherokees and the Choctaws). He had apparently been approached by a sand and gravel company to obtain approval of its view that it need not pay royalties to the Cherokee Nation for minerals extracted from the bed of the Arkansas River after Oklahoma's admission to the Union because, at that time, "the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma" (App., *infra,* p. 30). The letter proceeds to quote extensively from several of this Court's decisions, and concludes that the United States had reserved ownership of the riverbed until it passed automatically to Oklahoma upon statehood (App., *infra,* p. 34). In opposing certiorari, respondents contended that this letter is of "extreme importance" in showing a "long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration" (Brief in Opp., p. 16, Nos. 976 and 1104, O.T. 1968). This reliance is wholly misplaced.

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the variety of purposes which might have prompted the national government to have made such a grant and fails to confront satisfactorily the purpose and breadth of the treaties and patents at issue. See, also, *Lynch* v. *Clements*, 263 P. 2d 153 (Okla.). The question is, of course, as no one disputes, solely a matter of federal law.

Contrary to respondents' statements, and highlighting the principal deficiency of the letter, it featured absolutely no discussion of the treaties which are at the core of this lawsuit. The letter simply quoted from this Court's cases dealing in general terms with the "equal footing"-"implied trust doctrine"—cases which expressly recognized that the government had power in appropriate circumstances to convey riverbed lands (see App., *infra*, p. 33)—and mechanically assumed the answer to the very question at issue. The circumstances surrounding these treaties were not discussed, nor was the possible significance of the language defining the conveyance only by exterior metes and bounds.

The factual errors in the only sentence relevant to the issue further demonstrate the lack of attention given at the time to the real problem.[13] The letter states (App., *infra*, p. 34):

> In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the ownership of the beds of navigable streams but reserved them for the benefit of the future State within whose boundaries they would fall.

But the United States did not convey these tracts by warranty deed; it was the treaties and the patents pursuant thereto which accomplished the transfer of title. Those conveyances were not of lands occupied

[13] The letter was written at a time when allotment of the lands, with a view to liquidation of the tribes, was in active process. See *Federal Indian Law* (Dept. of the Interior), pp. 994 *et seq.*

by the Indian tribes; instead, they were of vacant lands given in return for cession of lands east of the Mississippi occupied by the tribes. There was no desire to retain the riverbeds for a future State within whose boundaries they would fall; the treaties expressly disclaimed the intention to create a State. These significant factual errors and omissions demonstrate why the conclusion reached, unaided by any explicit analysis or reasoning, deserves no weight in this Court's consideration of the issue.[14]

In addition, we note, there is no indication that the Indians affected were consulted on the question. And, since the letter post-dates the treaties and patents which are the focus of this case by more than seventy years, the conclusion reached can scarcely be termed the sort of "contemporaneous" administrative construction that may helpfully enlighten judicial interpretation of legal documents.

This Court is therefore entitled to approach these important questions afresh. For the reasons stated above, we believe that consideration of the terms of the Treaty of Dancing Rabbit Creek and the Treaty of New Echota, in light of their peculiar historical context, will show that the United States government did exercise the power confirmed by this Court's decisions to convey to the Cherokees and to the Choctaws the ownership of the bed of the Arkansas River where it flows through the lands granted to them.

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[14] The United States, this Court has held, cannot be estopped to disavow the errors of its subordinate officers. *E.g.*, *United States* v. *California*, 332 U.S. 19, 39–40.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed, and the cause remanded for further proceedings.

Respectfully submitted.

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JULY 1969.

APPENDIX

Department of the Interior, Office of Indian Affairs
WASHINGTON, *Mar. 26, 1908.*

Subject:
Purchase of sand and gravel by Lowerree Rucker Company from bed of Arkansas River

The Honorable, The Secretary of the Interior.

Sir: I have the honor to invite your attention to the enclosed letter of March 2 from J. G. Wright, Commissioner to the Five Civilized Tribes, submitting communication of February 13 from the United States Indian Agent, Union Agency, relative to an application made on August 30, 1907, by the Lowerree Rucker Company for permission to enter into a contract for the taking of sand and gravel from the Arkansas River within the limits of the Cherokee Nation. Mr. Wright quotes the Agent as reporting that a representative of the Lowerree Rucker Company called at his office and said that practically no gravel had been taken out of the river prior to November 16, 1907, the date when the Indian Territory became incorporated as a part of the State of Oklahoma; that it was the contention of the company that the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma; and that for that reason the company did not think it proper to enter into a contract to pay royalties to the Cherokee Nation for gravel taken from a river situated in the State of Oklahoma.

The Commissioner says that there are in existence other contracts for the taking of sand and gravel from the Arkansas River, which the War Department has held to be a navigable stream, and that all the parties to such contracts are contending that from and after November 16, 1907, when Indian Territory became a part of the State of Oklahoma, neither the Cherokee Nation nor the Department of the Interior had further jurisdiction in the matter, and that they should no longer be required to pay royalty on sand and gravel taken from the bed of any navigable stream. Commissioner Wright asks for instructions.

In the case of Shively vs. Bowlby (152 U.S. 1) the Supreme Court very thoroughly discusses the question of riparian rights and quotes from certain of its previous decisions from which the following is cited:

In the case of Weber v. Harbor Commissioners (18 Wall. 65, 66), involving the question of ownership of lands below tide-water at San Francisco:

> Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government.

The case of Knight v. United States Land Association (142 U.S. 183):

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States; and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.

In St. Clair v. Lovingston (34 Wall. 64, 68):

> By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.

In summing up the case before it the court said:

> Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Consitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international

duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

The Arkansas River throughout its length in the Cherokee Nation is a navigable stream under the laws of the United States.

Under the above-quoted holding of the Court, it must be conceded that when the State of Oklahoma was created, its jurisdiction and ownership of the lands below high water mark of all navigable streams within its boundaries, became absolute. In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the ownership of the beds of navigable streams but reserved them for the benefit of the future State within whose boundaries they would fall. Thus, the State of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas River, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 16, 1907.

Very respectfully,

s/C. F. LARRABEE,
Acting Commissioner.

Approved:

s/JESSE E. WILSON,
Secretary.

MARCH 27, 1908.

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